IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1672 OF 2006
IN
SUIT NO.1757 OF 2005

Bank of India ...Plaintiff

Versus

Mr.Narendra Vishnu Bandekar & Anr. ...Defendants

And

Mrs.Aruna Narendra Bandekar & Anr. ..Respondents

Shri Ashish Kamat i/by V.Deshpande & Co for the Plaintiff.

Shri H.V.Chande for the Defendants.

CORAM : ABHAY S.OKA, J.
DATED : JULY 25, 2007.

P.C.:

1. This Chamber Summons has been taken out by the original Plaintiff for amendment of the plaint. The prayer is for impleading the Respondents in the chamber summons as the Defendant No.1(a) and 1(b) and for adding consequential averments in paragraph Nos.13 and 14 of the plaint.

2. The submission of the learned counsel for the Plaintiff in support of chamber summons is that on the date of institution of the suit the Plaintiff was not aware that the first Defendant was no more. He pointed

out the averments made in the affidavit in support of the chamber summons in which it is stated that when a notice of motion for the interim relief in suit was moved on 15th September, 2005, the learned counsel appearing for the second Defendant informed the Court that the first Defendant had expired. He submitted that on the basis of the letter dated 06th December, 2006 sent by the learned Advocate for the second Defendant, the present chamber summons is taken out for impleading parties. He placed reliance on certain decisions of this Court and submitted that as the Plaintiff was not aware that the first Defendant was already dead on the date of the institution of the suit, the legal representatives can be permitted to be impleaded even by taking recourse to Rule 10 of Order I of the Code of Civil Procedure, 1908. The learned counsel for the Defendants submitted that the suit itself was nullity as the same was filed against a dead person. He also placed reliance on another decision of this Court and submitted that even an order passed permitting the Plaintiff to substitute the first Defendant by his legal representatives will be nullity.

3. I have carefully considered the submissions made by the learned counsel appearing for the parties. The suit filed by the Plaintiff is for a money decree and

for various other reliefs. According to the case of the Plaintiff, the first and second Defendants had obtained a term loan from the Plaintiff Bank under the "Star Suvidha Scheme". According to the Plaintiff the third Defendant guaranteed the repayment of the amount by the first and second Defendants. It must be stated here that the second Defendant is the son of the first Defendant.

4. It will be necessary to refer to the affidavit in support of the chamber summons. In paragraph No.8 of the affidavit it is stated that when the notice of motion for interim relief in the suit was moved on or about 15th September, 2001, the learned counsel for the second Defendant informed the Court that the first Defendant had expired. In paragraph No.9 it is stated that though the Plaintiff was aware that the second Defendant is one of the legal heirs of the first Defendant, the Plaintiff could not ascertain names of other legal representatives. In a fresh notice of motion for interim relief taken out by the Plaintiff, ad-interim relief was granted on 24th November, 2006. By the said order, the second Defendant was ordered and directed to disclose details of the other legal heirs of the deceased first Defendant. On the basis of the said direction, by a letter dated 06th December, 2006 the

learned Advocate on record for the second Defendant communicated to the Advocate for the Plaintiff that apart from the second Defendant, the widow of the deceased is his legal representative. Thereafter, the present chamber summons has been taken out. The learned counsel appearing for the Plaintiff placed reliance on a decision of the learned single Judge of this Court in the case of **M/s.Navendram Javermal Vs. Devikabai Haridas Gandhi & Ors. (AIR 1992 Bombay Page 589)**. The learned single Judge was dealing with a chamber summons by a plaintiff for bringing on record the Respondents in the chamber summons as Defendant Nos.1(a) and 1(b) in place of the first Defendant who was dead even at the time of institution of the suit. An objection was raised on behalf of the second Defendant that the suit against the first Defendant was nullity and therefore legal representatives cannot be brought on record. In paragraph No.7 of the said decision, the learned single Judge held thus:

> "7. In the present case it is the admitted position that some of the defendants are alive and it is not as if defendant No.1 was the only real defendant in the suit and in such a case, **in my view, it is the settled position as shown by the decisions referred to earlier, that the**

> **mere fact that one of the defendants was dead at the time of the institution of the suit does not render the suit a total nullity so that the heirs of the deceased defendant cannot be brought on record at all**. It is nobody's case that the application for bringing the heirs of the deceased defendant No.1 on record is not made bona fide". (Emphasis supplied)

In the same decision the learned single Judge expressed an agreement with the view taken by the Mysore High Court in the case of **C.Muttu Vs. Bharath Match Works (AIR 1964 Mysore Page 293)**. The learned single Judge thus accepted the view that in such a case provision of clause 2 of Rule 10 of Order I can be invoked for bringing heirs of the deceased Defendant on record. The learned counsel appearing for the Plaintiff has also placed reliance on another decision of the learned single Judge in the case of **Stephen Laslie Victor D'souza & Ors. Vs. Stanley Antony D'souza & Ors (AIR 1998 Bombay Page 149)**. In case before the learned single Judge a chamber summons was taken out by the Plaintiffs for condonation of delay and for setting aside the abatement of the suit as against the Defendant No.6 who was already dead at the time of filing of the suit. The learned single Judge placed reliance on

decision of the Apex Court in the case of **Karuppaswamy Vs. C.Ramamurthy (AIR 1993 Supreme Court Page 2324)**. After considering the view taken by the Apex Court in the case of Karuppawamy (supra) the learned single Judge observed thus:

> "7. I find substance in the submission made by Mr. Mehta. In fact this point is no more res integra, in Karuppaswamy Vs. C. Ramamurthy, consideration was about proviso to Section 21 (1) of the Limitation Act, 1963 read with Order XXII Rule 4 of the Code of Civil Procedure, 1908. In this case, the plaintiff filed a suit against a person not knowing that he had died six weeks prior to filing of the suit. The plaintiff became aware of the defendant's death only from the remarks on the returned summons. Immediately thereafter, he filed an application under Order XXII Rule 4 impleading the legal representatives of the dead defendant. The trial Court did not attribute any neglect or contumacy to the conduct of the plaintiff. High Court show that the plaintiff was aware of the death of the defendant and yet knowing well about it, he would persist in filing the

> suit against a dead person. It was, therefore, held that since the plaintiff had taken prompt action and had acted in good faith, the Proviso to Section 21(1) could be invoked in his favour and L.Rs. of the deceased defendant could be impleaded.
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> 8. Section 21 of the Limitation Act, 1963 states about effort of substituting or adding new plaintiff or new defendant. Proviso to Section 21 states that where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date".

5. The learned counsel appearing for the second Defendant placed reliance on a decision of another learned single Judge of this Court in the case of **Rampratab Brijmohandas Vs. Gavrishankar Kashiram (Volume XXV Bombay Law Reporter Page 7)**. He placed into service the following observations made by the learned single Judge:

> " Turning now to suits against a person carrying on business in a name other than his own, the Code of Civil Procedure, Order XXX, rule 10, provides that he may be sued in that name as if it were a firm name. The words "as if it were a firm name" are used advisedly, for one man cannot constitute a firm. When a suit is brought against such person in the name in which he carries on business, the suit is essentially one against him and he is the sole defendant in the suit. If he dies before suit, and a suit is brought against him in the name in which be carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit, by whomsoever accepted, is also a nullity. Similarly, any order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased as defendant and allowing the suit to proceed against him is also a nullity".

It is apparent that the learned single Judge was considering a case where a suit was brought against a Defendant in the name in which he carries on business.

The learned single Judge has observed that such a suit is essentially one against him and such person is the sole Defendant. In the context of the said factual matrix, the learned Judge observed that if such Defendant dies before the suit and the suit is brought against him in the name in which he carries on business, the suit is one against a dead man and is nullity from its inception. The learned single Judge proceeded to observe that an order made in the suit allowing amendment of the plaint by substituting the legal representative of the deceased Defendant was also nullity.

6. In the case of Karuppaswamy (supra) the Apex Court dealt with a case where a suit was instituted against a dead person. The trial Court rejected an application for substitution made under rule 4 of Order XXII of the Code. However, in revision before the High Court the Plaintiff succeeded. The High Court invoked subsection 1 of section 21 of the Limitation Act, 1963 and held that as the Plaintiff had acted in good faith, the date of filing the suit against the legal representatives shall date back to the institution of the suit.

7. Coming back to the facts of the present case,

the first and second Defendants are the alleged borrowers. The specific case made out in the plaint is that the loan was sanctioned to the first and second Defendants. Therefore, it cannot be said that in the present case the entire suit was nullity from its inception. Moreover, the second Defendant is admittedly a legal representative of the first Defendant. The case made out in affidavit in support is that the Plaintiff became aware of the death of the first Defendant only when a notice of motion for interim relief came up on board on 15th September, 2005. In the reply filed by the second Defendant to the chamber summons, it is not the case of the second Defendant that the Plaintiff was aware on the date of institution of the suit that the first Defendant was dead. The only contention raised is that the first Defendant had passed away on 18th April, 2004 and therefore, the suit being nullity as against the first Defendant, his legal representatives cannot be brought on record. In view of the averments made in the affidavit in support of the chamber summons, I am satisfied that the Plaintiff has acted in good faith.

8. In my view, the law laid down by this Court in the case of M/s. Nevandram Javemal (supra) as well as in the case of Stephan Laslie Victor D’souza & Ors (supra) will govern this case. For the reasons which

are set out earlier, the view taken by the learned single Judge in case of Rampratab Brijmohandas (supra) will have no application to the case.

9. The chamber summons deserves to be allowed. Hence, chamber summons is made absolute in terms of prayer clause (a). Amendment to be carried out within a period of six weeks from today. The learned counsel for the second Defendant submits that for a reasonable time the Plaintiff may not be permitted to carry out the amendment. Hence, for a period of three weeks from today, the Plaintiff will not carry out amendment on the basis of this order.

JUDGE